KAWASAKI KISEN KAISHA, LTD

v.

OWNERS OF THE SHIP OR VESSEL "ABLE LIEUTENANT"

HIGH COURT, MALAYA SHAH ALAM
ZULKEFLI MAKINUDDIN J
[ADMIRALTY IN REM NO. MT4-27-26-2001]
26 AUGUST 202

SHIPPING AND NAVIGATION: *Action in rem - Arrest of vessel - Application by third party to set aside writ - Whether third party lacked capacity to set aside writ - Whether such right restricted to real defendant only*

SHIPPING AND NAVIGATION: *Action in rem - Arrest of vessel - Whether defendant was registered owner of vessel - Whether ship register conclusive as to this fact - Whether there was error or fraud in ship register*

SHIPPING AND NAVIGATION: *Action in rem - Admiralty jurisdiction - Whether admiralty jurisdition of High Court could be validly invoked by plaintiff - Supreme Court Act 1981 [UK], s. 21 - Courts of Judicature Act 1964, s. 24(b)*

CIVIL PROCEDURE: *Writ of summons - Striking out - Whether there were triable issues*

CIVIL PROCEDURE: *Pleadings - Necessity for express pleadings - Whether there was failure to plead in clear and unambiguous terms*

CIVIL PROCEDURE: *Affidavits - Filing and service - Amended bail bond - Whether failure to seek amendment to main prayer to include affidavit renders amended bail bond defective*

This was the plaintiff's claim, as indorsed in its writ of summons, as charterer of the defendant's ship or vessel "Able Lieutenant" under a charterparty, for damages suffered as a result of the defendant's breach of the charterparty. After issuing the writ of summons, the plaintiff then obtained a warrant of arrest for the "Able Lieutenant". The defendant, Able Shipping Sdn. Bhd. ('Able Shipping'), which had executed the said charterparty in its capacity as the registered owner of the "Able Lieutenant", entered a conditional appearance as defendant as of right while Pan Ocean Shipping Sdn. Bhd. ('Pan Ocean'), claiming to be a beneficial owner of the "Able Lieutenant", did the same. Pan Ocean, *via* encl. 29, and Able Shipping, *via* encl. 31, both sought to set aside or alternatively strike out the plaintiff's writ of summons; Pan Ocean also took

out an application in encl. 21 for the "Able Lieutenant" to be released from arrest upon filing of its bail bond. The plaintiff *via* encl. 39 prayed for orders that leave to enter conditional appearance and Pan Ocean's memorandum of conditional appearance be set aside, and that Pan Ocean ceases to be a party or to be considered as a party in these proceedings as the appearance entered by Pan Ocean was wrong in law or did not comply with the Rules of the High Court 1980.

Held:

[1] Pan Ocean was not the defendant to the action as it merely had a beneficial interest in the vessel; hence, it lacked the capacity to apply to the court to set aside the writ. This right was restricted to Able Shipping, the real defendant. (p 484 e-f)

[2] In the instant case, the defendant was the registered owner of the "Able Lieutenant", and although Pan Ocean and the defendant argued that the ship register was not conclusive, they had failed to prove that Able Shipping's name on the register appears by error or fraud; therefore, it must be taken that the register was conclusive. (p 495 a)

[3] Following s. 24(b) of the Courts of Judicature Act 1964, this court had to apply the United Kingdom Supreme Court Act 1981 ('UK Act') in the same manner as an English High Court. In the circumstances of this case, the plaintiff had discharged the onus of proof on it, and had properly brought this action under the admiralty jurisdiction of this court pursuant to the UK Act. (p 496 g)

[4] In the circumstances of the present case, whether the property in the said vessel passed or not was a triable issue, and together with several other triable issues raised by the plaintiff, could only be resolved at the trial or by subjecting the deponents of the various affidavits to cross-examination. (pp 499 e, 500 g-i & 501 a)

[5] The defendant and Pan Ocean, in their respective applications, failed to make an election as to whether to challenge jurisdiction or to invoke the court's jurisdiction to hear the case on its merits. If a party wishes the court to set aside a writ or strike out the writ, it is incumbent upon that party to place before the court in clear, unambiguous terms its expectations, and not leave it to the court to make its preference. (p 501 d-e)

[6] Although Pan Ocean have put forward a fresh amended bail bond by way of an affidavit (encl. 50), the court was not empowered to determine encl.

50 as Pan Ocean had not sought an amendment to encl. 21 to include this. Enclosure 50 was an ancillary prayer and it was subject to the main prayer; thus, it could not be used to launch an application different from what was prayed for in the application itself. (p 502 d)

[Enclosures 21, 29 and 31 dismissed; encl. 39 allowed.]

Case(s) referred to:

Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa & Ors [1996] 4 CLJ 461 ***(refd)***
PP Persero v. Bimacom Property & Development Sdn Bhd [1999] 6 CLJ 275 ***(refd)***
The "Andres Bonifacio" [1993] 3 SLR 521 ***(refd)***
The "APJ Shalin" [1991] 2 Lloyd's Law Reports 62 ***(refd)***
The "Aventicum" [1978] 1 Lloyd's Law Report 184 ***(dist)***
The "Banco" [1971] 1 Lloyd's Law Report 49 ***(refd)***
The "Bolbina" [1994] 1 SLR 554 ***(refd)***
The "Bulgaria" [1964] 2 Lloyd's Report 524 ***(refd)***
The "Eschersheim" [1976] 2 Lloyd's Law Reports 1 ***(refd)***
The "Evpo Agnic" [1988] 2 Lloyd's Law Reports 411 ***(refd)***
The "Hope (Panagia)" (unreported) ***(refd)***
The "I Congreso Del Partido" [1977] vol 1 Lloyd's Law Reports 536 ***(refd)***
The "Kapitan Tempkin" [1998] 3 SLR 254 ***(refd)***
The "Kommunar" (No. 2) [1997] 1 Lloyd's Law Report 8 ***(refd)***
The "Loon Chong" [1982] 1 MLJ 212 ***(refd)***
The "Loon Choong" [1982] 1 MLJ 212 ***(refd)***
The "Mawan" Now Named "Mara" [1998] 2 Lloyd's Law Reports 459 ***(refd)***
The "Naamlooze Vennootschap" [1925] 20 Lloyd's Law Report 296 ***(refd)***
The "Ohm Mariana" [1993] 2 SLR 698 ***(refd)***
The "Opal 3" [1992] 2 SLR 585 ***(refd)***
The "Permina 108" [1977] 1 MLJ 49 ***(refd)***
The "Saudi Prince" [1982] 2 Lloyd's Law Report 255 ***(dist)***
The "Sino Glory" [1997] 4 AMR 3694 ***(refd)***
The "Temasek Eagle" [1999] 4 SLR 250 ***(refd)***
The "Tian Sheng No 8" [2000] 2 Lloyd's Law Reports 430 ***(refd)***
The "Tjaskemolen" [1997] 2 Lloyd's Law Report 465 ***(foll)***
The "Wilbie" [1983] 1 MLJ 204 ***(refd)***
The "Yih Shen" [1985] 2 MLJ 154 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 24(b)
Rules of the High Court 1980, O. 12 r. 7, O. 18 r. 19, (1)(b), (c), (d), O. 70 rr. 12(6), 15, 16, form 155

Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships 1952 [International], arts. 3.1, 3.2
Supreme Court Act 1981 [UK], ss. 20(1), (2), 21(4)(b)(i), 22, 23, 24

Other source(s) referred to:
Chorley and Giles, *Shipping Law*, pp 35, 589
Dicey & Morris, *The Conflict of Laws*, 2000, 13th edn, p 456

For the plaintiff - Mathew Kurien (Raj Sativale); M/s Sativale Mathew Arun
For the defendant (Able Shipping) - Eric Siow; M/s Lee Ong & Kandiah
For the defendant (Pan Ocean) - S Selvaratnam (Kevin Wong) (TS Oon; M/s TS Oon & Partners); M/s Tommy Thomas

Reported by Suresh Nathan

JUDGMENT

Zulkefli Makinuddin J:

Facts Of The Plaintiff's Case
The plaintiff's claim as indorsed on the writ of summons is as follows:

The plaintiff, as charterer of the defendant's ship or vessel "Able Lieutenant" under a charterparty dated 2 October 2000 claimed damages for the loss and damages suffered by it by reason of the defendant's breach of the said Charterparty together with interest and costs. The defendant in this action is Able Shipping Sdn Bhd ("Able Shipping") who executed the said charterparty in its capacity as owner of the vessel "Able Lieutenant" and is also the registered owner of the vessel "Able Lieutenant" which is registered at the port of registry, Port Klang. The plaintiff issued the writ of summons on 24 November 2001. On 29 November 2001 plaintiff obtained a warrant of arrest for the vessel "Able Lieutenant" and on the same day the warrant was executed and the ship arrested in Port Klang. On 4 December 2001, Pan Ocean Shipping Sdn Bhd ("Pan Ocean") claiming to be beneficial owner of the ship "Able Lieutenant", entered a conditional appearance as defendant as of right. On 6 December 2001, Able Shipping, the proper defendant and registered owner of the ship "Able Lieutenant" entered a conditional appearance as defendant also as of right.

Purpose Of Arrest Of Ship In An Admiralty Action *In Rem*
At the outset, it is also important to note that the purpose of arresting a ship in an action *in rem* is to obtain security for the satisfaction of any judgment which the plaintiff may obtain in such an action, or of any sum which may become payable to him under a settlement of such an agreement. In practice, this threat of an arrest provokes the owners into providing voluntary security, for example by way of either a bank or insurance company guarantee, or letter of undertaking or filing a bail bond. The court does not have any jurisdiction to arrest or keep the ship under arrest for other purposes. Such security will ensure that the plaintiff's prospects of recovery are not hampered by any transfer of ownership in the ship or any financial impecuniosity of the

shipowner. If security is not furnished by the shipowner, the arrest of the ship will be maintained until such step is taken by the plaintiff under the in rem process to seek from the court for a judicial sale order of the ship.

Pan Ocean's Notice Of Motion In Encl. (29)

In the motion taken out on 14 December 2001, Pan Ocean, which has entered conditional appearance as the beneficial owner of the vessel "Able Lieutenant" in the above suit, seeks the following orders:

1. To set aside the writ of summons dated 24 November 2001.
2. To strike out the writ for abuse of the court process and/or frivolous and vexatious.
3. To set aside the warrant of arrest issued for the vessel "Able Lieutenant"
4. To forthwith release the vessel "Able Lieutenant" from arrest.
5. Alternative to (4) to discharge any security furnished for the release of the vessel "Able Lieutenant" and for the return of the security to Pan Ocean.
6. To assess the damages for wrongful arrest suffered by Pan Ocean.
7. Costs and costs of the motion to be borne by the plaintiffs.
8. Such other relief that this honourable court thinks fit and just.

Defendant's Summons In Chambers In Encl. (31)

In the summons in chambers taken out on 19 December 2001, the defendant, Able Shipping who had entered conditional appearance in the above suit seeks the following orders:

1. To set aside the writ of summons dated 24 November 2001 and its service and all further proceedings in this action.
2. Alternatively, to strike out the indorsement of claim in the writ of summons dated 24 November 2001 under O. 18 r. (19)(1)(b) RHC 1980 and under the inherent jurisdiction of the court for the reason that it is scandalous, frivolous or vexatious and detrimental to the beneficial owners of the ship or vessel "Able Lieutenant".
3. Alternatively, to strike out the indorsement of claim on the writ of summons dated 24 November 2001 under O. 18 r. 19(1)(c) RHC 1980 and under the inherent jurisdiction of the court for the reason that it may prejudice, embarrass or delay the fair trial of the action.

4. Alternatively, the indorsement of claim on the writ of summons dated 24 November 2001 be struck out under O. 18 r. 19(1)(d) RHC 1980 and under the inherent jurisdiction of the court for the reason that it is an abuse of the court process.

5. To set aside the warrant of arrest dated 29 November 2001 on the ship or vessel "Able Lieutenant".

6. That the ship or vessel "Able Lieutenant" presently under arrest in Port Klang be released from arrest forthwith.

7. That costs be assessed and paid out by plaintiff to Able Shipping Sdn. Bhd. forthwith.

8. That Able Shipping Sdn Bhd be given all further relief or other relief as the honourable Court thinks fit and just thinks fit and just.

Plaintiffs' Summons In Chambers In Encl. (39)

The plaintiff took out a summons in chambers on 4 January 2002 in encl. (39) for several prayers. On 8 January 2002 this court directed that the following prayers from this application in encl. (39) shall be heard simultaneously with Pan Ocean's application in encl. (29). The prayers are as follows:

1. An order that leave to enter conditional appearance and the Pan Ocean's Memorandum of Conditional Appearance dated 4 December 2001 be set aside.

2. An order that Pan Ocean cease to be a party or be considered as a party in this proceedings by reason that the appearance entered by Pan Ocean in these proceedings is wrong in law or does not comply with the Rules of the High Court 1980 and/or the appearance entered by Pan Ocean is irregular without a court order of this honourable court.

Pan Ocean's Summons in Chambers in Encl. (21)

On 10 December 2001 Pan Ocean also took out an application seeking the following orders:

1. That leave be given to Pan Ocean to file a bail bond in the form of Appendix 1 annexed to the application without submitting to the jurisdiction of the honourable court;

2. That the vessel "Able Lieutenant" be released from arrest, upon filing of the bail bond in the form of Appendix 1 without any undertaking by Pan Ocean Sdn Bhd as to costs, charges or expenses relating to the arrest;

3. That service of the notice of bail be dispensed;

4. Such further or other order that this honourable court deems fit;

5. That the cost of this application be costs in the cause.

The learned counsel for Pan Ocean at the outset of the hearing informed this court that Pan Ocean would be seeking for the orders as prayed for in encl. (21) only in the event that the court dismisses Pan Ocean's application for the orders sought for under its notice of motions as in encl. (29).

Findings And Decision Of The Court

Having studied the affidavits filed on behalf of the plaintiff, the defendant (Able Shipping) and Pan Ocean and having heard the submission of learned counsels for the plaintiff, Able Shipping and Pan Ocean respectively I have arrived at a decision for the applications in encl. (21), encl. (29), encl. (31) and encl. (39) for prayers (1) and (2) as follows:

The plaintiff has raised a preliminary objection on Pan Ocean's notice of motion as in encl. (29). As regards the plaintiff's preliminary objection to Pan Ocean's notice of motion in encl. (29) I hereby allowed the said preliminary objection. It is my finding that as Pan Ocean is not the defendant to the action, it lacks the capacity to apply to the court to set aside the writ. This right is restricted to the defendant only. The real defendant, Able Shipping has entered appearance as well as of right as the defendant in this action and this has caused embarrassment and vexed the proceedings. The claim disclosed on the writ is not against Pan Ocean. What Pan Ocean claims is simply a beneficial interest in the ship. Therefore it is merely a person interested in the ship and not a defendant on the claim. On this issue in the case of *"The Bolbina"* [1994] 1 SLR 554 the court therein *inter alia* had this to say:

> Persons against whom no claim is made ought not to be described as or included as defendants. A defendant enters an appearance as of right whereas persons interested in the ship must obtain leave to intervene and after obtaining leave appear as intervenors.

The above passage was approved by our Court of Appeal in the case of *Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa & Ors* [1996] 4 CLJ 461 wherein the Court of Appeal *inter alia* stated as follows:

> The ship's owners (those legally liable for the plaintiff's claim) would enter appearance as of right. Persons interested must obtain leave of court to intervene and after obtaining leave would appear as intervenors.

It must also be noted that O. 70 r. 16 of the Rules of High Court 1980 ("RHC 1980") provides a specific rule for persons interested in the ship to intervene

in an admiralty action and not to come in as a defendant as of right. Pan Ocean appears to have deliberately ignored this provision to take an advantage because as intervenor they may not be entitled to seek an order from this court to set aside the writ. In the case of *The "Mawan" Now Named "Mara"* [1998] Vol 2 Lloyd's Law Reports 459 the court decided that the correct procedure for owners of an arrested vessel who became owners and acquired title after the issue of the writ should be to intervene in the action. Pan Ocean claiming beneficial ownership should therefore have intervened pursuant to O. 70 r. 16 RHC 1980 but did not do so. As such that they cannot be considered as a party in this action. Further convincing support comes from the case of the *"Yih Shen"* [1985] 2 MLJ 154 where a party alleging beneficial ownership had intervened in the action so as to be a proper litigant in the action.

Pan Ocean also argues that the writ does not identify the defendant and that any one claiming to be defendant can enter appearance as of right. I could not agree with Pan Ocean's contention. I am of the view that in an admiralty action in rem, it is the practice not to identify a defendant by name on the face of the writ but to identify the defendant simply as owners of the ship or vessel against whom the claim is made. The writ in this action follows this practice. (See Form 155 of RHC 1980.) The identity of the defendant in this case nevertheless has been clearly disclosed by reference to the indorsement on the writ which identifies charterparty with the defendant Able Shipping. It is also not disputed that Able Shipping is the registered owner of the ship "Able Lieutenant" and that they would be liable on the plaintiff's claim.

The test to determine whether a person can be a proper defendant is to consider if that person would be liable for the plaintiff's claim should the plaintiff succeed in the action. Not anyone can jump in as defendant. On this ground alone, Pan Ocean has no basis to be defendant. Learned counsel for Pan Ocean argues that owners includes beneficial owners. To my mind this is plainly wrong because Pan Ocean is not liable on the claim. Pan Ocean has relied on a few case authorities where alleged beneficial owners have appeared as of right. However, in all the cited cases by Pan Ocean I find there is only one defendant. That alone distinguished those cases from the present situation. In the case of *"The Temasek Eagle"* [1999] 4 SLR 250 and in the case of *"The Andres Bonifacio"* [1993] 3 SLR 521 cited by counsel for Pan Ocean appearance was entered for the owners of the vessel such that if they failed to set aside the writ the defendants would be liable for the claim. It is also noted that in the case of *"The Andres Bonifacio"*, the beneficial owners furnished bail bonds for the plaintiffs' claims, so that if they did not succeed to set aside the writ these bail bonds could be used to satisfy a judgment of the court. In the present case, appearance has been in a special way, with no precedent in the history of admiralty actions – Able Shipping "as registered

owners" and Pan Ocean "as beneficial owners". It is also noted that Pan Ocean has refused to furnish bail bond which will not answer to plaintiff's claim. In the case of *The "Tian Sheng No 8"* [2000] Vol 2 Lloyd's Law Reports 430 the defendant who entered appearance was the registered owner of the vessel, not beneficial owner as alleged by Pan Ocean. The case has therefore been wrongly cited.

I am of the view that if Pan Ocean is right in its contention then in each admiralty case, there will always be several defendants – legal owner, beneficial owner, part owner etc. Obviously this cannot be right because Pan Ocean cannot and has not produced a single authority where there are two defendants or a case where one defendant appears as "registered owner" and the other as "beneficial owner" in the same action. On the other hand I find that learned counsel for the plaintiff have cited a clear authority in the Malaysian case of the *"Yih Shen" (supra)* where both registered owner and alleged beneficial owner appeared in a different capacity. Owners liable on the claim were the defendants and the party claiming beneficial ownership appeared as interveners. Faced with this unarguable position, learned counsel for Pan Ocean says the objection is technical. She argued if Pan Ocean had intervened, this court would have made it a defendant. I do not see the logic of this argument as an intervener and a defendant are two different persons. A defendant would be liable on the claim but an intervener is not. It is my view that Pan Ocean's appearance as a defendant, when the real defendant has appeared, is not a mere irregularity but a nullity because it affects the substantive rights of the plaintiff and is prejudicial to the plaintiff. Further it is confusing to the court due to uncertainty of the proper defendant.

Based on the above mentioned grounds it is my finding that because of its status in this action is invalid Pan Ocean does not have the right to apply to set aside the writ and to seek other orders as in its notice of motion. I hereby dismissed with costs Pan Ocean's application in encl. (29). For the same reasons I hereby allowed the plaintiff's application in encl. (39) and grant the orders sought for as in prayers 1 and 2.

Even assuming Pan Ocean is entitled to enter appearance as of right as a defendant in this case by virtue of its contention that it is the beneficial owner of the ship "Able Lieutenant", I am still of the view that the real issue to be determined by the court is whether the admiralty *in rem* action was properly taken out by the plaintiff against the owners of the ship in accordance with the provision of s. 21(4) of the United Kingdom Supreme Court Act 1981 ("UK Act").

Background On 1952 Arrest Convention And The United Kingdom Supreme Court Act 1981 ("UK Act")

Before dealing with the above issue it is important to bear in mind the underlying rationale of the 1952 Arrest Convention and the UK Act that gave effect to it.

1952 Arrest Convention

Shipping is the most international of all the world's great industries and not surprisingly a large number of international conventions govern the maritime industry. One of them is the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships 1952, in short, the Arrest Convention which sets out the law for the arrest of a sea going ship. More then 70 states are parties to the Arrest Convention and many other states (including Malaysia) have given effect to the convention even though they are not a party. (See the International Convention For The Unification Of Certain Rules Relating To The Arrest Of Sea-Going Ships 1952)

United Kingdom Supreme Court Act 1981 ("UK Act")

The United Kingdom is a party to the Arrest Convention. At first United Kingdom enacted the Administration of Justice Act 1956 ("AJA") and the AJA only implemented the Arrest Convention partially. Commonwealth countries like Malaysia and Singapore followed the United Kingdom and gave effect to AJA in their domestic legislation. Then in 1981 United Kingdom enacted the UK Act to give full effect to the Arrest Convention, the relevant sections being ss. 20-24 of the UK Act in respect of the admiralty jurisdiction of the court. Malaysia followed suit by the Courts of Judicature (Amendment) (No 2) Act 1984 (Act 606) and subsequently *vide* Courts of Judicature (Amendment) Act 1987 (Act 670) but Singapore did not do so. In the premiss, there are glaring differences in respect of the respective municipal laws relating to admiralty jurisdiction in Malaysia and Singapore.

Section 20(1) of the UK Act sets out the extent of the admiralty jurisdiction of the court. Section 20(2) identifies a 'closed' list of maritime claims within the court's admiralty jurisdiction and s. 21 provides for the mode of exercise of this admiralty jurisdiction that gives the power of arrest. These are the two sections which are relevant in the present context of this case.

The Application Of The UK Act In Malaysia

As stated above, Malaysia enacted an amendment to the Courts of Judicature Act 1964 to give force of law to the admiralty jurisdiction provisions of the UK Act as provided under s. 24(b) of the Courts of Judicature Act 1964 which states as follows:

Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include:

[(b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981;]

Interaction Between The 1952 Arrest Convention And The Supreme Court Act 1981 ("UK Act")

Before leaving the discussion on the background, it is worth noting that in England the courts are ready to use 1952 Arrest Convention to interpret the UK Act. There is a long line of shipping cases where the English courts have considered the provisions of the 1952 Arrest Convention in order to construe the wording of the statutes as can be seen in the following cases:

(i) "*The Eschersheim*" [1976] 2 Lloyd's Law Reports 1

(ii) "*The Banco*" [1971] 1 Lloyd's Law Report 49

(iii) "*The Kommunar*" (No. 2) [1997] 1 Lloyd's Law Report 8

(iv) "*The Evpo Agnic*" [1988] 2 Lloyd's Law Report 411

(v) *The "I Congresso Del Partido"* [1977] 1 Lloyd's Law Report 536

In the book by Dicey & Morris, *The Conflict of Laws* [2000] 13th edn at p. 456, the authors had this to say:

> The Supreme Court Act 1981 was enacted to implement the Brussels Convention of 1952 on the Arrest of Seagoing Ships. In interpreting the Act recourse may be had not only to the Brussels Arrest Convention itself but also to its "*travaux preparatoires*", the proceedings of the conference which led to it.

The purpose and effect of s. 21(4) of the Supreme Court Act 1981 ("UK Act")

On that background I shall now proceed to consider s. 21(4) of the UK Act which reads as follows:

> In the case of any such claim as is mentioned in Section 20(2)(e) to (r), where:
>
> (a) the claim arises in connection with a ship and
>
> (b) the person who would be liable on the claim in action *in personam* ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,
>
> an action *in rem* may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against:

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or

(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

What Pan Ocean has alleged is that at the time this action was brought, it was the beneficial owner of all the shares in the ship "Able Lieutenant" and not the defendant. Pan Ocean contends that since the defendant (Able Shipping) was not the beneficial owner of the said ship when this action was brought, the plaintiff have no right to arrest the ship "Able Lieutenant" because this is in violation of the provision of s. 21(4)(b)(i) of the UK Act. The defendant (Able Shipping) who has entered appearance as a defendant is also taking the same approach as Pan Ocean for its application in encl. (31). On this point of contention by both Pan Ocean and the defendant, with respect I could not agree with such a contention. I am of the view the issue to be determined in this case is not on the meaning to be given to the term or words "beneficial ownership" in the context of the provision of s. 21(4)(b)(i) of the said UK Act, but on the question as to when or under what circumstances the plaintiff has to prove beneficial ownership to enable it to properly institute an admiralty *in rem* action against owners of ship as a defendant.

I am of the view that the law places the burden on the plaintiff to prove beneficial ownership of a registered ship only in those cases when the defendant is not the registered owner at the time when the action is brought and the vessel arrested. In all other cases, the said UK Act enacted to give effect to the Arrest Convention follows the ship register. Considering there is no public register for beneficial ownership of ships, if the view of the law by Pan Ocean and the defendant is to hold then all maritime nations might as well close down their shipping registries. The provisions for registration in our Merchant Shipping Ordinance 1952 would then appear to have no regulatory purpose. Also the Arrest Convention which is only concerned with legal ownership would have no effect. For these reasons it is my view the law cannot be as stated by Pan Ocean and the defendant.

The question that may be posed is why is the word "beneficial" used in the UK Act? I take the view that in using the word "beneficial" the legislature had only one objective to catch the owner operating a registered ship under a nominee to avoid its arrest. This view is confirmed by his Lordship Justice Robert Goff in the case of *The "I Congreso Del Partido"* [1977] Vol 1 Lloyd's Law Reports 536 wherein at p. 563 his Lordship had this to say:

> As I read s. 3(4), the intention of Parliament in adding the word "beneficially" before the word "owned" in s. 3(4) was simply to take account of the institution

> of trust, thus ensuring that, if a ship was to be operated under a cloak of trust, those interested in the ship would not thereby be able to avoid the arrest of the ship." (Note: Section 3(4) here is the provision under the repealed Administration of Justice Act 1956).

In view of the abovementioned proposition English courts (and Malaysian courts) would apply the beneficial ownership provision in the UK Act in such a manner to achieve the particular objective as stated by his lordship justice Robert Goff. Therefore s. 21(4)(b)(i) must be interpreted and applied in the context of the purpose of s. 21(4) of the UK Act. When properly construed under the purpose of s. 21(4) of the UK Act, it will be seen that the courts give effect to the word "beneficial" only in specific cases.

What Is The Purpose Of Section 21(4), Supreme Court Act 1981 ("UK Act")

In the case of *The "Evpo Agnic" (supra)* the English Court of Appeal at p. 415 had this to say *inter alia* on the purpose of s. 21(4) of the UK Act:

> The purpose of Section 21(4) is to give rights of arrest in respect of "the particular ship", ships in the ownership of the owners of "the particular ship" and those who have been spirited into different legal, i.e. registered, ownership, the owners of "the particular ship" retaining beneficial ownership of the shares in that ship. This was the situation in *The "Saudi Prince"* [1982] 2 Lloyd's Law Report 255 and was alleged to be the situation in *The "Aventicum"* [1978] 1 Lloyd's Law Report 184.

Based on the abovementioned case of the *"Evpo Agnic"* it can be said that there are three rights of ship arrest provided for by s. 21(4) of the UK Act. Firstly, it is the arrest of the particular ship (category 1), secondly, arrest 'of the sister ship' (category 2) and thirdly arrest of a particular ship spirited away into a different legal ownership (category 3). In the case of categories 1 and 2, it is my view that the burden of proof is on the plaintiff to show that the defendant is the registered owner of the vessel when the writ is issued. This follows the Arrest Convention where only legal ownership matters. Article 3(1) and (2) of the Arrest Convention reproduced below states as follows:

> Article 3.1
>
> Subject to the provisions of s. 4 of this Article and of Article 10, a claimant may arrest either the **particular ship** in respect of which the maritime claim arose, **or any other ship** which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in Article 1(1)(o)(p) or (q).

Article 3.2

Ships shall be **deemed** to be in the **same ownership** when all the shares therein are **owned** by the same person or person."

[emphasis added].

The issue of beneficial ownership does not arise in categories 1 and 2 because the registered owner of a ship registered in a recognised port registry under the laws of a maritime nation is also its beneficial owner. The English Court of Appeal case of the *"Evpo Agnic"* and the case of *"Tian Sheng No 8" (supra)* can be cited as authorities for such a proposition. The case of the *"Tian Sheng No. 8"* is a decision of the highest appellate court in Hong Kong, equal to our Federal Court. Even in the Singapore High Court case of *"The Kapitan Tempkin"* [1998] 3 SLR 254, the court therein at p. 257 said:

The certificate of registration is important documentary evidence in deciding who the beneficial owners of a ship for purposes of jurisdiction are … .

Learned counsels for Pan Ocean and the defendant in their reply have not countered these abovementioned case authorities.

The third right of arrest (category 3) under s. 21(4) of the UK Act as stated in the *"Evpo Agnic"* case is the right to arrest ships spirited away into different registered ownership. It is in this situation the plaintiff has the burden of proof to establish beneficial ownership. This is obvious as it is pointless relying on the register because the register would show the new owners who are strangers to the plaintiff and who would not be liable on the claim. So in this situation if a plaintiff brings action against the ship, he must be in a position to prove that the ship though registered in a stranger's name is beneficially owned by the person who would be liable to him. This is illustrated by the two cases referred to by Lord Donaldson MR in his judgment in the *"Evpo Agnic"* case namely, the case of the *"Saudi Prince"(supra)* and the case of the *"Aventicum"(supra)*. In the case of the *"Saudi Prince"* the plaintiffs arrested the vessel "Saudi Prince" for a cargo claim. When the cause of action arose the ship was owned by one Mr Orri. But before the writ was issued, the ship was transferred to another company SSST, where Orri and his children owned all the shares. The new registered owners SSST argued they were the new legal and beneficial owners and not liable on plaintiffs' claim. Plaintiffs therefore had to prove that, despite the change in the register, Mr Orri retained the full beneficial interest in the ship and therefore the ship could be arrested for the claim. The court found that on the evidence SSST was a nominee of Mr Orri and that beneficial ownership of the ship remained with him. In the case of the "Aventicum" where a similar situation arises plaintiffs arrested the vessel for a cargo claim. Between the time when the cause of action arose

and when the writ was issued, the ship *"Aventicum"* had undergone two changes of legal ownership. Both sets of new owners were strangers to the plaintiffs and not liable on the claim. Plaintiffs argued that while it was true there had been changes in the legal ownership, the defendants, they said remained the beneficial owner despite the two changes in the register. The plaintiffs could not succeed because they could not prove this.

Both the cases of the *"Saudi Prince"* and the *"Aventicum"* show defendants, the persons who would be liable to the plaintiffs, were not the registered owners of the ships when arrested. In each case the plaintiffs argued, despite the change of registered owner, beneficial ownership was retained by the previous owners liable to the plaintiffs. Both cases illustrate the principle that the plaintiffs bear the burden of proving beneficial ownership only when they want to proceed against a ship not in the registered ownership of the defendant who would be liable to them on the claim. This is the only situation where the court would ignore the owner's name listed on the ship's register and look behind the register to catch the real shipowner hiding behind the nominee. In all other cases, the registered ownership of the ship as in the ship's register is paramount.

The Case Of The "Tjaskemolen"

The case of the *"Tjaskemolen"* [1997] 2 Lloyd's Law Report 465 is a direct authority on the application of the beneficial ownership provision in s. 21(4)(b)(i) of the UK Act. Learned counsel for Pan Ocean has also submitted this case in support of its contention. An analysis of this case in my view with respect to Pan Ocean's contention does not so support its contention at all. In the *"Tjaskemolen"* case the plaintiffs claim was for damages for breach of charterparty concluded between plaintiffs as Charterers and one Bayland, the Owners of the "Tjaskemolen". When the writ was issued, the ship had already been sold to one Golden Navigation. Golden Navigation purchased the ship, registered it in the Port of Belize and renamed it "Visliet". It was in these circumstances, the court said the plaintiffs must prove that Bayland, were the beneficial owners of the ship when the action was brought because it was in a different registered ownership. On this point his Lordship Justice Clarke explains in the case of *"Tjaskemolen"* at p. 468 *inter alia* as follows:

> Bayland were both the persons who would be liable on the claim in action in personam and the owners (that is the legal owners) of the vessel when the cause of action arose. That is common ground. It is equally common ground that, in order to satisfy the provisions of s. 21(4)(b)(i) of the Supreme Court Act 1981, the plaintiffs must prove that when the writ was issued, Bayland were the beneficial owners of the vessel.

The plaintiffs had to prove Bayland were the beneficial owners and to do this they had to show the legal transfer to Golden Navigation was a sham or a façade. On this point his Lordship Justice Clarke in the case of the *"Tjaskemolen"* at p. 471 had this to say:

> But in the present context the cases seem to show that, where the alleged transfer is a sham or a façade, it will not have the effect of transferring the beneficial ownership of the transferor in the vessel concerned … . It may be that, if legal title is transferred, the transferee would hold the vessel as trustee for the transferor so that the beneficial interest in the same sense described in *The I Congreso del Partido* [1977] 1 Lloyd's Report 536 is retained by the transferor.

It is clear from the above passage the court investigates beneficial ownership only where the defendants are not the registered owners in line with his Lordship Justice Goff's comments in the case of the *"I Congreso del Partido"* and as adopted in the *"Evpo Agnic"* case. The court in the case of the *"Tjaskemolen"* on the facts found the transfer was a sham. His Lordship Justice Clarke's conclusion on the application of the term "beneficial" is in full agreement with the *ratio* as expressed in the case of the *"Evpo Agnic"* wherein at p. 474 of the said case his Lordship *inter alia* states as follows:

> In short, this an **example** of a case in which, in the words of Sir John Donaldson MR in **The Evpo Agnic**, the vessel has been **spirited** into **different ownership"** (emphasis added).

It is my finding that the case of the *"Tjaskemolen"* fully supports the plaintiff's proposition of the law and not that as contended by Pan Ocean and the defendant. Pan Ocean and the defendant relied also on the following English and Malaysian cases to show the court places the burden of proof on the plaintiff to investigate beneficial ownership in each and every case:

(i) *"The Aventicum" (supra)*

(ii) *"The Loon Choong"* [1982] 1 MLJ 212

(iii) *"The Hope (Panagia)" (Unreported)*

(iv) *"The Tian Sheng No 8" (supra)*

On this point of contention by Pan Ocean and the defendant, I only need to say that in the case of the *"Aventicum"* referred to earlier the plaintiffs were obligated to prove beneficial ownership because the ship was not in the registered ownership of the person who would be liable on the claim when writ was issued. In the case of the *"Loon Chong"* [1982] 1 MLJ 212 a decision of our Federal Court, plaintiffs (respondents) arrested the ship "Loon Chong" for a claim against one Lord Steamship CSA (Panama). But when

the writ was issued, the legal ownership had been transferred to one Melbourne Plaza Navigation SA (Panama). So the only way the plaintiff could invoke the admiralty jurisdiction was by proving that Lord Steamship was the beneficial owners even though registered owner was Melbourne Plaza. Though decided on the law before the coming into force of the 1981 UK Act, it is a classic case of a ship falling into the 3rd category of arrest spiriting the ship into a different registered ownership. The Federal Court in the case of the *"Loon Chong"* followed the *"Aventicum"* the case referred to in the *"Evpo Agnic"* wherein the Federal Court had this to say:

> It would however be open to the respondents to contend to the contrary on the premise that the documents and transaction entered into were fictitious and the ownership was in fact in Lord at the time of the issue of the writ and the arrest but the burden of proof in this regard would be on the respondents (*The Aventicum*).

The defendant (Able Shipping) also relied on the case of *"The Hope (Panagia)"[Unreported],* another Malaysian case decided in 1997 under Supreme Court Act 1981. In that case there was a change of registered ownership and once again the burden was placed on the plaintiffs to prove beneficial ownership only because the defendant was not the registered owner of the ship when the action was brought.

Is The Ship Register Conclusive As To The Ownership Of A Registered Vessel?

Pan Ocean and the defendant have argued the ship register is not conclusive. I would take the view that the ship register is conclusive except for error or fraud. Two authorities clearly established this point. In the case of the *"Tian Sheng No 8" (supra)* the Hong Kong Court of Final Appeal had stated as follows:

> Conceivably, there are circumstances where it might be shown that the registered owner was in fact not the legal and beneficial owner of all the shares in the ship: The fraudulent procurement of registration would be an example. But, in the general run of things, registration would be virtually conclusive and it would take an exceptional case for it to be otherwise.

In the case of the *"Kapitan Temkin" (supra)* at p. 257 the court therein *inter alia* also makes the position clear as follows:

> The certificate of registration, adds *Chorley & Giles Shipping Law* at p. 36, 'fulfils to a certain extent the function of title deed'. In this sense the certificate of registration is similar to a certificate of title issued under the Torrens system of land registration which was replicated from the paradigm of the ship registration system. The title evidenced by the certificate of registration is similarly indefeasible, subject of course to rectification in cases like error or fraud. See *The Bineta* [1966] 2 Lloyd's Report 419.

The onus of proof is therefore on Pan Ocean and the defendant to show that Able Shipping's name on the register appears by error or fraud. Since they have not done this it must be taken that the register is conclusive. Under English law, in the case of a registered ship, once the plaintiff establishes that the defendant is the registered owner of the ship when the writ is issued, the burden of proof shifts to the person contending otherwise. A reference to the book by Chorley and Giles, *Shipping Law*, 8th Edition supports the above proposition wherein at p. 35 it had this to say:

> registration is also important as proof of title. It is not conclusive but furnishes at least *prima facie* evidence of the registered owner being the true owner, thus resulting in a shifting of the burden of proof. Whoever without being registered claims ownership must displace that *prima facie* evidence.

This *prima facie* evidence rule does not apply in Singapore, so their decisions have to be read with caution. This was confirmed in the case of *"The Opal 3"* [1992] 2 SLR 585 where the court therein after referring to the above quoted passage in Chorley and Giles, *Shipping Law* at p. 589 said as follows:

> the principle of *prima facie* evidence stated in Chorley and Giles is supported by *"The Rose"* and *"The Bineta"* but they must be read with reference to British Law.

The burden of proof therefore has shifted to Pan Ocean and the defendant to dispel the plaintiff's case established by the plaintiff.

Distinguishing The Singapore Decisions In "The Andres Bonifacio" And "The Temasek Eagle".

Singapore decisions in the case of *"The Andres Bonifacio" (supra)* followed in the case *"The Temasek Eagle" (supra)* are two cases which were decided differently and are said to be in support of Pan Ocean and the defendant's contention. It is my view that the decisions of the said two cases are peculiar to Singapore and can be distinguished for the following reasons:

1. Singapore does not follow the case of the *"Evpo Agnic"* though it recognised the *dictum* there as the *ratio decidendi* of the case. In particular, Singapore courts do not accept the word "owner" in s. 21(4)(b) means "registered owner" as decided by the *"Evpo Agnic"* which is consistently approved and applied in a number of English Court of Appeal decisions and recently approved in the case of the *"Tian Sheng No. 8"*. In the case of *"The Ohm Mariana"* [1993] 2 SLR 698 the Singapore Court of Appeal on the meaning of the word "owner" at p. 707 had this to say:

> In our opinion, The *Evpo Agnic* is not an authority for the proposition that the word "Owner" in S. 21(4)(b) (which is equivalent of s. 4(4) of our Act) means the "registered" owner.

2. Singapore will not look at the Arrest Convention to interpret their law on arrest. His Lordship Wee Chong Jin CJ in the case of the *"Permina 108"* [1977] 1 MLJ 49 at p. 50 said as follows:

> In our opinion the terms of section 4(4) of the Act, giving them their plain and ordinary meaning are free of any ambiguity and are not reasonably capable of more than one meaning. It follows that it is unnecessary and indeed it would be wrong to look at the International Convention Relating to the Arrest of Seagoing Ships signed at Brussels in 1952 to arrive at the proper construction of our subsection.

3. Singapore does not apply the full provisions of the Supreme Court Act 1981 as Hong Kong and Malaysia do but follows the earlier UK Administration of Justice Act 1956 repealed in the UK and Malaysia.

4. The cases of *"Andres Bonifacio"* and the *"Temasek Eagle"* have not been followed in any of the English cases on beneficial ownership. Learned counsel for Pan Ocean submitted that the case of the *"Andres Bonifacio"* decided in 1993 "settled the law", yet no jurisdiction outside Singapore has applied it in the context of s. 21(4)(b)(i) of the UK Act. The net result is neither counsel for Pan Ocean nor counsel for the defendant have cited a single authority decided under the specific provision of s. 21(4)(b)(i) of the UK Act in any jurisdiction which decides plaintiff has to prove beneficial ownership when the defendant is the registered owner of the arrested vessel. All the English and Malaysian cases are completely against them including the case of the *"Tjaskemolen" (supra)* which appears to be the only direct case on the application of s. 21(4)(b)(i) of the UK Act decided on the principle laid down in the *"Evpo Agnic"* case.

It is my view that under s. 24(b) of our Courts of Judicature Act 1964 this court has to apply the UK Act in the same manner as an English High Court would, and therefore, decided English cases should be followed over Singapore decisions which are in conflict and which do not apply the UK Act. In the circumstance of this case it is my finding that the plaintiffs have discharged the onus of proof on them and have properly brought this action under the admiralty jurisdiction of this court pursuant to the UK Act.

Further, on the plaintiff's alternative argument against Pan Ocean's application in encl. (29) and the defendants application in encl. (31), I am of the view if it is necessary for the plaintiff to prove at the time the admiralty *in rem* action was taken the beneficial owner of the ship "Able Lieutenant" was not the defendant but Pan Ocean then the plaintiff is not precluded from proving that the transfer of beneficial ownership of the ship from the defendant to Pan Ocean is a sham transaction. Learned counsels for both Pan Ocean and the defendant have argued that "sham" means fraud and therefore contended that

plaintiff must prove sham beyond reasonable doubt. On this point I find that the plaintiffs have contended sham throughout. Nowhere in plaintiff's affidavits or submission of counsel have plaintiff alleged fraud. I take the view that Pan Ocean's and the defendant's attempt to equate sham with fraud is a baseless attempt to raise standard of proof. Sham transaction in the context of the present case means not a genuine sale and not an arm's length transaction but a commercial arrangement. It may even be called a sale of convenience. All cases involving sham transactions such as *"The Tjaskemolen"*, *"The Saudi Prince"*, *"The Aventicum"* and the Malaysian case of *"The Loon Chong"* sham was proved on a balance of probabilities. In another Malaysian case, *"The Sino Glory"* [1997] 4 AMR 3694 sham was also proved on a balance of probabilities.

In raising the issue of sham transaction the plaintiff has questioned whether any person with a commercial interest would purchase a vessel valued at USD3 million with outstanding mortgage of USD10 million? I am of the view that a person would do so only if it is a sham arrangement or a sale of convenience. I also find that for the defendant (Able Shipping) to sell their asset for USD3 million and retain a mortgage debt USD9.5 million on the same asset (which given the dire financial situation they can never settle) smacks of a sham. Learned counsel for defendant argues that the presence of mortgages does not prevent a sale of the vessel. It was contended for the defendant the fact that an asset is encumbered by an unpaid mortgage is also of no hindrance to a potential buyer as then the potential buyer would ensure that the mortgage be discharged from the purchase price. I am in full agreement with such a statement but Pan Ocean appears to have only made arrangements to discharge one mortgage debt of USD0.5 million. The other mortgage debt of USD9.5 million also remains undischarged till to date and this has to be discharged by the defendant who is in a state of insolvency. Therefore it is highly unlikely that a normal transfer of an asset could have taken place in such a situation unless the alleged sale is a sham arrangement.

Pan Ocean also argues they bought the vessel subject to bank's interests. But there is no independent confirmation from the mortgagee banks. The only evidence are affidavits filed in another court case showing the mortgagees are aware of the sale. These affidavits cannot be given due weight as evidence in this action. Even so, the mortgagee banks state unequivocally that they want to sell the vessel to recover their mortgage debt. Pan Ocean has informed the banks it is prepared to buy the vessel and discharge the mortgage debt and the banks are naturally gratified if a buyer is willing to discharge USD10 million mortgage in addition to paying the value of the ship at USD3 million. To my mind, it is like a dream come true for the mortgagee banks caught out lending more than three times the value of the asset. This dream remains

unrealised. It must be noted that if the sale was subject to mortgagees' interests, then there would be a transfer of mortgage. In the mortgage form, registered at the Port Klang ship registry there is no transfer of mortgage. Letters from bank's solicitors also show ownership of the ship remains in the defendant. If the alleged sale to Pan Ocean was done with the express consent of the mortgagee, their solicitors would have stated so in their letter.

Pan Ocean and the defendant also contended that the sale of the said ship "Able Lieutenant" took place before the plaintiff filed its claim. It was argued that the plaintiff's claim did not exist when bill of sale was executed, so it cannot be a sham. I am of the view that the date of bill of sale does not matter because it can be secretly executed for future claims. On this point I would like to refer to the case of *"Tjaskemolen"* (supra) wherein at p. 471 his Lordship Justice Clarke had this to say:

> That case is an example of piercing the corporate veil where assets are deliberately transferred from A to B in the knowledge that to do so will defeat a creditor's claim or potential claim even if that is not proved to be the purpose of doing so.

It is also noted that it was a condition in the memorandum of agreement in cl. 30 between Pan Ocean and defendant (Able Shipping) that the sale of "Able Lieutenant" must be kept secret and confidential even if the sale was not completed. [See exh. "SS1" in encl. (30)]. Learned counsel for defendant also argues that the bill of sale has divested the title from defendants and vested in Pan Ocean. However a reference to a letter from mortgagee bank solicitors dated 3 January 2002. [See exh. 9d in encl. (48)] showed otherwise wherein *inter alia* it states as follows:

> We are to state here that payment from Able Shipping Sdn Bhd is still due and owing to our client to this point in time. The above is the only vessel secured to our client.

I would hasten to add that if title had been divested, the bank would be pursuing Pan Ocean instead of the defendants. It must be noted that under the Merchant Shipping Ordinance 1952 ("MSO") a bill of sale must be recorded in the ship registry to pass title. The title to the ship therefore cannot pass to the purchaser unless the bill of sale is recorded in the registry in the buyer's name. (See the case of *"The Wilbie"* [1983] 1 MLJ 204). The bill of sale in this case [see exh. "SS2" in encl. (30)] also contains a similar note which states *inter alia* as follows:

> A purchaser of registered Malaysian vessel does not obtain a complete title until the Bill of sale is recorded at the Port of Registry of the ship; neglect of this precaution may entail serious consequences.

Learned counsel for Pan Ocean and the defendant contended that property in the ship passed without the need for any registration under MSO. I could not agree with such a contention and only need to cite the case of "*Naamlooze Vennootschap"* [1925] 20 Lloyd's Law Report 296 wherein at p. 300 the English Court of Appeal had this to say:

> Now the law relating to the transfer of ships is one of peculiar nature. All the incidents that relate to the sale of chattels clearly do not relate to the sale of ships because the transactions are governed to a large extent by the provisions of different Merchant Shipping Acts. It was said by Turner LJ in the case of *Hooper v. Gumm* 2 Ch. App. 282 in which he had to deal with an American ship at p. 290, that:
>
> A ship is not like an ordinary personal chattel; it does not pass by delivery; nor does the possession of it prove the title to it. There is no market overt for ships.
>
> Whether the proposition may not be subject to certain limitations and restrictions it is quite unnecessary to decide now: but it is quite plain that a great deal of the law as to the passing of property in ship depends upon the provisions of the Merchant Shipping Acts.

Therefore in the circumstances of this present case it is my finding whether the property in the said ship "Able Lieutenant" passed or not is a triable issue.

Learned counsel for Pan Ocean claims they have sent the ship documents for transfer at the ship registry in Port Klang and it has been lying there for the last seven months. On this state of position Pan Ocean is in I am of the view that the conclusion that can be drawn is that Pan Ocean is definitely not entitled to be registered as an owner of the ship "Able Lieutenant". Learned counsel for Pan Ocean also argues plaintiffs' charterparty with the defendant expired on 6 October 2001. Therefore it was submitted that plaintiff have no right to the claim. I could not agree with such a contention. The charterparty was done on 2 October 2000 and has an automatic renewal clause every three months. The date 6 October 2001 is not the expiry date but the renewal for the next three months – the 4th renewal under the charter party [See exh. "NKP1" in encl. (3)]. The charter party was executed between plaintiffs and defendant and the defendant fully accept and agree that the charter party was extended on 6 October 2001 for further three months.

Pan Ocean further alleged that plaintiff had notice of Pan Ocean's beneficial ownership of "Able Lieutenant" before its arrest. It is noted that the plaintiff admit receiving the said fax from defendant on 5 November 2001 stating simply:

> We have sold vessel, Able Lieutenant to Pan Ocean Sdn Bhd. Kindly deliver the said vessel to new owner immediately.

This was the very first notification though the ship was allegedly sold on 19 February 2001, ten months earlier and kept a secret. I am of the view that the said fax from the defendant did not notify "beneficial" ownership at all. Nor were details of the bill of sale or memorandum of agreement furnished. Until this action, plaintiff had no knowledge of the bill of sale. Neither can Pan Ocean prove plaintiff had such knowledge. The said fax also appears suspicious as no telephone numbers, no fax number and no address of the sender are given which appears unusual for a commercial company. To find out the truth the plaintiff checked with the ship registry at Port Klang twice on 24 November 2001 and 28 November 2001 which confirmed defendant was the registered owner. There was never any intimation of beneficial ownership. Pan Ocean argues plaintiff had prior knowledge of beneficial ownership as early as 6 October 2001 and relies on exchange of email messages. Not one of the messages exhibited shows the fact of such notice to plaintiff. In fact, the email message of 5 November 2001 from plaintiffs to one, Capt Pani from Pan Ocean discloses that plaintiff was not even sure Pan Ocean was the registered owner of Able Pilot, another ship registered in the name of Pan Ocean six months earlier but not revealed to the plaintiffs by Pan Ocean. There is also a circular showing "Able Lieutenant" is owned by a controlling company named Malaysian Merchant Marine Bhd ("MMM"). On 24 October 2001, nine months after the alleged purchase of the ship by Pan Ocean, notices were sent out to the shipping community by MMM stating they were the owners of the ship. Pan Ocean's allegation that plaintiff was aware of their beneficial ownership is therefore devoid of merit.

Apart from the above mentioned disputed issues it is also my finding that plaintiff have raised several other triable issues by pointing out serious conflict of material evidence and inconsistencies in the following subject matters:

- validity of bill of sale.
- validity of memorandum of agreement.
- validity of supplemental agreement.
- Whether Pan Ocean had actually paid the purchase price of the ship.
- Whether Pan Ocean insured the ship, employed the crew and paid for all the expenses.
- The close connections between the defendant and Pan Ocean.
- How Pan Ocean/MMM controlled defendant's activities through a company named Mymerine.

It is my finding that these issues can only be resolved at trial or by subjecting the deponents of the various affidavits to cross examination.

The defendant and Pan Ocean have argued that the issue of admiralty jurisdiction must be decided at this stage. Learned counsel for Pan Ocean urged that the prayers 1 and 2 of its notice of motion in encl. (29) are for deciding jurisdiction. She said it is for the court's preference which prayer to use – to set aside or strike out. I find this submission is plainly wrong. While prayer 1 of application in encl. (29) is a challenge to jurisdiction under O. 12 r. 7 of RHC 1980, prayer two invokes the court's jurisdiction to strike out the writ under the court's summary powers in O. 18 r. 19 of RHC 1980. The same goes for prayers 2, 3 and 4 of defendants' application in encl. (31) which invoke the court's jurisdiction under O. 18 r. 19 of RHC 1980. It appears that the defendant and Pan Ocean are blowing hot and cold wherein on one hand challenging the jurisdiction of the court and on the other hand seeking the court's jurisdiction to investigate the merits of the plaintiffs' claim as disclosed on the writ. Defendant and Pan Ocean in their respective applications have failed to make an election as to whether to challenge jurisdiction or invoke the court's jurisdiction to hear the case on its merits. (See the case of *PP Persero v. Bimacom Property & Development Sdn Bhd* [1999] 6 CLJ 275. If a party wishes the court to set aside a writ or strike out the writ, it is incumbent upon that party to place before the court in clear unambiguous terms the expectation and not leave it to the court to make its preference, as suggested by Pan Ocean. The considerations for setting aside under O. 12 r. 7 of RHC 1980 and striking out under O. 18 r. 19 of RHC 1980 are different. When it is not a plain and obvious case, where there is serious conflict of material evidence and when there are several complicating triable issues of fact and law, the court should set down the matter for trial.

In the case of *"The Hope (Panagia)"* (unreported) defendant applied to set aside or strike out the writ at the same time. In the face of conflicting affidavit evidence, his Lordship Ghazali J (as he then was) set down the issue of beneficial ownership for trial. In the case of *"The Andres Bonifacio"(supra)* the Court of Appeal blamed the plaintiffs for their failure in not requesting for further discovery or an application to examine the deponent when there is conflict of material evidence. Here in the present case the plaintiff have filed an application to cross examine the deponent to the various affidavits in encl. (39) and the opportunity must be given to verify the truth of the facts.

In the circumstances of this case even if the court is to decide the case on the basis of the plaintiff's alternative argument that the alleged transfer of beneficial ownership from the defendant to Pan Ocean is a sham transaction,

I would have also dismissed both Pan Ocean application in encl. (29) and the defendant's application in encl. (31) with costs and set down the matter for trial.

Finally, I shall deal with Pan Ocean's application in prayer 2 of encl. (21) to furnish an amended bail bond for the release of the ship "Able Lieutenant" as contained in appendix 1 of the application. It must be stated here that after the hearing is well under way Pan Ocean has completely abandoned the amended bail bond of appendix 1 of encl. (21). Instead they have now put forward a fresh amended bail bond by way of an affidavit as in encl. (50). On this fresh amended bail bond I find that Pan Ocean has not sought an amendment to prayer 2 of encl. (21) to include this. It is my finding the court is not empowered to determine the fresh amended bail bond in encl. (50) because it is not part of encl. (21).

Learned Counsel for Pan Ocean argues this fresh amended bail bond can be considered under prayer 4 of encl. (21): "such further or other order". It is my view that this prayer is an ancillary prayer and subject to the main prayer and cannot be used to launch an application different from what is prayed for in the application itself. On this ground alone I would dismiss prayer 2 of the application in encl. (21) with costs since Pan Ocean have abandoned it.

Even assuming that it is proper and in order for Pan Ocean to have put forward a fresh amended bail bond by way of an affidavit in encl. (50) I would still dismiss the application for the following reasons:

1. A reference to para. 1 of the bail bond showed that the bond does not secure the claim in the action. In the usual case there is only one defendant and the reference to defendant in the bail bond causes no confusion on identity. However, there is a peculiar situation of two defendants in the present case wherein it is unclear and uncertain which defendant is being referred. Therefore the defendant Able Shipping Sdn Bhd must be named to avoid confusion with defendant, Pan Ocean. This is consistent with para. 2 of the bail bond which refers to the claim in this action because only the defendant, Able Shipping would be liable for the claim in this action.

2. A reference to para. 3 of the bail bond showed that it is prejudicial to the plaintiffs because of the following:

   (i) The paragraph recognised and acknowledges Pan Ocean as the beneficial owner of the vessel, which is the subject of challenge.

(ii) The paragraph recognized and acknowledges Pan Ocean have the *locus standi* and right to apply to set aside/strike out the writ which is being challenged by the plaintiffs. In the case of *"The Bulgaria"* [1964] 2 Lloyd's Report 524 the application to amend the bail bond was made by the registered owners of the vessel defending the claim and their capacity to enter appearance was not subject of challenge.

(iii) The paragraph states "court's finding that the defendant is Pan Ocean". There is no such prayer for determination of this court. On admiralty jurisdiction, the issue is whether the defendant is the beneficial owner of the ship "Able Lieutenant".

In the case of *"APJ Shalin"* [1991] 2 Lloyd's Law Reports 62 his Lordship Justice Sheen on the issue of order for the release of a ship at p. 67 had this to say:

> I cannot foresee any circumstances in which it would be right for the Court to order the release of a ship without security being given against the wishes of a creditor who has properly exercised his right to arrest the ship.

Based on the above mentioned case authority I would state that this court would release the vessel only when there is a sufficient and proper alternative security given for the plaintiff's claim in the action. In the circumstance of this case it is my finding that the proposed bail bond furnished by Pan Ocean under its so-called fresh amended bail bond as in encl. (50) is ineffective and invalid as it did not comply with the format of a bail bond provided under O. 70 r. 12(6) of the RHC 1980. Pan Ocean's application in encl. (21) is therefore dismissed with costs.